STATE OF CONNECTICUT

OFFICE OF PROTECTION AND ADVOCACY FOR
PERSONS WITH DISABILITIES
60B WESTON STREET, HARTFORD, CONNECTICUT 06120-1551

James D. McGaughey
Executive Director

Phone 1/860-297-4307
Confidential Fax 1/860-297-4305

Testimony of the Office of Protection and Advocacy for Persons with Disabilities Before the Committee on Labor and Public Employees

Submitted by: James D. McGaughey
Executive Director
February 27, 2014

Good afternoon, and thank you for this opportunity to comment on **Raised Bill No. 5279, An Act Eliminating the Minimum Fair Wage Exception for Certain Citizens of Connecticut.** I apologize for not being able to personally appear and testify, but I have a conflicting commitment.

This Bill itself is short and simple: one sentence that would repeal a provision in current statute (Section 31-67) which permits the Labor Commissioner to issue a "special license", authorizing a person whose "earning capacity is impaired by age or physical or mental deficiency or injury" to be employed at less than the fair minimum wage. However, the issue the bill raises is not quite so simple.

In 1992, our Office informed the Connecticut Department of Labor that Section 31-67 was likely in conflict with provisions of the Americans with Disabilities Act and with the federal Fair Labor Standards Act. (See attached letter dated September 17, 1992, addressed to Gary Pechie, Director of what is now called the Wage and Workplace Standards Division of DOL.) It is our understanding that since receiving that correspondence, the State Department of Labor has issued no new sub-minimum wage "special licenses".

This is not to say, however, that there are no Connecticut workers with disabilities being paid a sub-minimum wage. In addition to any pre-1992 license holders who may still be operating, under Section 14(c) of the federal Fair Labor Standards Act, employers may apply to the U.S. Department of Labor's Wage and Hour Division for a certificate authorizing them to pay a "special minimum wage" to workers who have disabilities that affect their job performance. In fact, in preparation for a special monitoring project we are currently conducting in an effort to better inform ourselves about the situations of sub-minimum wage workers, our Office recently obtained a listing of employers currently holding Section 14(c) Certificates in Connecticut. There are 60 such employers, most of whom are affiliated with human services organizations.

The origins of Section 14(c) date back to the Great Depression, when the first federal minimum wage legislation was enacted. At that time there were approximately 200 "sheltered workshops" in the United States. These were places where people with disabilities – mostly people who were blind – performed piecework. When it was pointed out that enactment of minimum wage legislation would cause those people to lose their jobs, an exception was carved out. Since that time, however, the number of sub-minimum wage employers has grown to approximately 3,500

– which is actually down from the nearly 6,000 listed a little over a decade ago. No one knows exactly how many people are employed by these certificate-holders; estimates range from 200,000 – 300,000 individuals.

The future of federally sanctioned sub-minimum wage ("special minimum wage") employment is somewhat uncertain. Disability advocacy groups that are lobbying for abolition of 14 (c), point out that many former sub-minimum wage employers have abandoned the practice, finding ways to pay, or otherwise support the fully paid employment of people with disabilities without resort to "special" minimum wages. In addition, there are clear policy contradictions between maintaining the minimum wage exception of Section 14 (c), and the goals and principles articulated in the Americans with Disabilities Act and the Rehabilitation Act. In fact, the Justice Department has recently brought suit against school boards that routinely referred special education students to workshops instead of more hopeful transitional employment programs. Those cases have been bolstered by statistics which demonstrate that sub-minimum wage work tends to keep people with disabilities segregated and seldom leads to competitive wage employment. Indeed, there have been examples of unscrupulous certificate-holders deliberately under-estimating the productivity levels of especially capable workers in order to justify holding them back in sheltered settings, so that they would have staff they could count on to "crank out the work", which often comes in spurts. Perhaps the worst example of this type of exploitation involved a labor contractor (Henry's Turkey Services) that recruited workers from institutions in Texas to work side-by-side with non-disabled, fully-paid workers in slaughter houses and poultry processing plants in the mid-west. For most sub-minimum wage employees, however, the prevalent reality is just low expectations and "down time" – periods of demoralizing, "day-wasting" idleness that only serve to re-enforce the absolutely inaccurate notion that people with disabilities cannot be truly productive workers.

Despite these realities, the practice of paying "special" minimum wages has defenders. Defenders point out that unemployment rates amongst people with disabilities are more than twice those of non-disabled workers. They also refer to the experience in Arizona, which adopted a State minimum wage law several years ago without recognizing any exception, and then faced a backlash from families of thousands of sheltered workshop workers who were suddenly unemployed. That backlash translated into creation of State subsidized "day programs", which are not only costly to the State, but for many people operate as a major structural barrier to employment, effectively guaranteeing them careers as perpetual "clients" rather than as workers and wage earners. Creating such programs for working age adults is generally considered to have been a step in the wrong direction for Arizona, just as expanding them would be in Connecticut.

A Bill currently before Congress to reauthorize the Workforce Investment Act includes a section that would impose new limitations on the issuance of Section 14 (c) certificates. That provision is being opposed by many advocacy groups who argue that we have the knowledge and

technology to support people with even significant disabilities in competitive wage jobs, and that it is high time we simply end the practice of treating them like second class workers. The reality of ever-shrinking governmental funding for human services programs is also quietly finding its way into the discussion. Whether or not one finds the notion of paying people with disabilities less than the fair minimum wage to be offensive, it is becoming increasingly clear that more people with disabilities will need to earn real money – to work for competitive wage rates - in order to support themselves in their communities.

There are two things to bear in mind when considering repeal of Connecticut's statutory scheme for sub-minimum wage employment: First, the industry that has evolved around paying people at less-than-competitive wages is unlikely to change itself – at least in the near future. While many former sheltered workshop providers have found ways to transform their operations to support competitive employment for their workers, others cannot see their way around various institutional barriers to conversion. Facing the reality of an end to "special" exceptions to minimum fair wage laws may be the only way encourage them to change. Second, there is a real risk that moving suddenly to shut off the sub-minimum wage switch could produce crises for families and for people who are currently going to work every day, albeit for less than competitive pay. This would not only be unfairly disruptive to those families and individuals, but it could also lead to increased reliance on "day programs", many of which amount to little more than semi-organized day-wasting adult baby-sitting.

Considering these two factors, I would urge that if this bill moves forward, the implementation date be extended until 2015 or 2016. That would give reasonable time to develop and implement plans for the individuals affected to obtain competitive wage opportunities, but would also create sufficient pressure to ensure that funding agencies and providers do, in fact, move forward. Thank you for this opportunity to comment on this Bill. If there are any questions please contact me.

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September 17, 1992

Gary Pechie, Director
Regulations of Wages
Department of Labor
200 Folley Brook Blvd
Wethersfield, CT 06109

RE: Conn. Gen. Stat. Sec. 31-67

Dear Mr. Pechie:

Recently it has come to our attention that Sec. 31-67 of the General Statutes may be in conflict with the Americans with Disabilities Act (ADA) and the Fair Labor Standards Act (FLSA). Section 31-67 and regulations thereunder, enable the Labor Commissioner to issue special licenses authorizing employment at wages less than the minimum wage for persons with physical or mental disabilities.

While the purported purpose of this law is to "prevent curtailment of employment opportunities" for persons with disabilities, in reality, there continues to be widespread discrimination against individuals with disabilities in the workplace. The ADA attempts to address this disparity by equalizing employment opportunities for all applicants with disabilities. Thus, an over-arching principle of the ADA is to promote the employment of "qualified" people with disabilities.

A "qualified" individual is a person with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position. Because individuals with disabilities must be "reasonably accommodated," it should be the rare case where a worker is placed in a job that s/he cannot do. Consequently, it should be the rare case where a worker earns less than a co-worker due to an "impaired earning capacity.". In fact, our office believes that the only time a person might arguably earn less, due to a disability, is in the case of a sheltered workshop or a supported employment setting.

Under the Fair Labor Standards Act, it is also the rule that exemptions from minimum wage requirements must be strictly and narrowly construed. In 1986, the FLSA was substantially revised with respect to workers with disabilities. Perhaps the most important revision was the inclusion of procedural safeguards to

protect the rights of such workers. Now, employers are required to submit written six month reviews of individuals paid an hourly rate, and any worker receiving a special minimum wage is entitled to an administrative review process. See 29 C.F.R. Secs. 525.1 and 525.22. Additionally, FLSA regulations provide definitions for terms such as: "worker with a disability," "employ," and "commensurate wage." 29 C.F.R. Sec. 525.3.

In its present form, Sec. 31-67 does not provide any procedural protections for workers receiving special minimum wages. Nor does it define key terms such as "disability" or "employment." Lastly, it does not provide for the consideration of a "reasonable accommodation" which may actually preclude a finding of "impaired earning capacity" in some instances. Thus, by comparison, Sec. 31-67 appears to be a very general statute which is not in compliance with either the FLSA or the ADA standards.

To the extent that Sec. 31-67 provides less protection than the ADA and FLSA, it must be considered invalid. Both the ADA and the FLSA contain provisions preempting state and federal laws that do not provide equal or greater protections. See 42 U.S.C. Sec. 12201(b); 28 C.F.R. 35.103; 29 U.S.C. 525.20. On the same grounds, Sec. 31-67 would be invalid under the Supremacy Clause (see Art.1, Sec. 1, U.S. Constitution) and possibly our own State Constitution Article XXI, which proscribes discrimination and the denial of equal protection of the law.

As a final matter, we note that Connecticut law in this area appears to be modeled after the Fair Labor Standards Act of 1938. However, Sec. 31-67 has not been revised since 1959 and therefore, does not reflect such substantial changes in the law as the FLSA Amendments of 1986 and the ADA. Thus, we urge you to seek revision of Sec. 31-67 and regulations thereunder, as soon as practicable, and to refrain from issuing additional special licenses until appropriate procedural and substantive safeguards are implemented.

Please feel free to contact our office should you need any information or assistance in this process. Thank you for your consideration of this matter.

Sincerely,

Catherine E. Cushman

Catherine E. Cushman
Staff Attorney

c: Atty. Heidi Lane
Elinor Budryk
Peg Dignati